BRIAN IVOR HYACINTH & ORS

v.

HONG GEOK HEOK

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-21-96]
18 OCTOBER 2002

CIVIL PROCEDURE: *Amendment - Writ and statement of claim - Amendment seeking for remedy arising out of possible failure of initial cause of action - Whether creating new cause of action - Whether barred by limitation*

This was an appeal by the defendant against the decision of the learned senior assistant registrar granting leave to the plaintiffs to amend the writ and the statement of claim. The facts were that the plaintiffs had sought various declarations against the defendant respecting a certain property which had allegedly been simultaneously sold to both the third plaintiff and the defendant, following which the third plaintiff had applied to amend the pleadings so as to include an alternative prayer that, in the event that the declarations be refused, she be refunded the sums that she had advanced towards the property. Before the learned judge, the main issue that arose was whether the amendment sought had created a new cause of action or was barred by limitation.

Held:

[1] What the third plaintiff is seeking is a remedy. The causes of action have already been pleaded in the prayers. The only amendment sought is as to the reimbursement of the monies expended and therefore is not caught by limitation, since the alternative claim for reimbursement is only a remedy arising from the possible failure of the initial cause of action for a declaration. (p 135 g)

[Appeal dismissed.]

Case(s) referred to:
Tilcon Ltd v. Land and Real Estate Investment Ltd [1987] 1 All ER 615 ***(foll)***

Legislation referred to:
Rules of the Rules the High Court 1980, O. 18 r. 19

For the defendant/appellant - KK Yeang; M/s Yeang & Co
For the plaintiff/respondent - A Suppiah; M/s Presgrave & Matthews

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

This is an appeal by the defendant against the decision of the learned senior assistant registrar (the SAR) granting leave to the plaintiffs to amend the writ and the statement of claim.

In his supporting affidavit to the application the 3rd plaintiff who averred on her behalf and on behalf of the other plaintiffs stated that the initial pleadings were filed by a different firm of solicitors. She averred that since the 3rd plaintiff had spent a sum of RM77,162.47 on the premises, particulars of which she had stated in detail in the proposed amended statement of claim, she had sought this amendment to include the alternative prayer that she be refunded the said sum if the court ruled in favour of the defendant. Further, the other amendments sought were minor in nature and would not affect the defendant's case in any way.

The defendant in opposing this application averred that he had no knowledge of the 3rd plaintiff and had no dealings with her. He also averred that on 12 September 2001 his appeal against the learned SAR's decision in refusing to strike out the 3rd plaintiff's claim against him under O. 18 r. 19 of the Rules of the High Court 1980 was dismissed by this court and that since then numerous case management dates had been fixed and thus this application to amend would delay and derail the trial. Further it was his argument that the amendment sought has created a new cause of action.

Findings Of The Court

The 1st and 2nd plaintiffs (husband and wife) were allotted a cluster house by the Perbadanan Pembangunan Pulau Pinang (PDC) and the 1st and 2nd plaintiffs allegedly sold the said cluster house to the 3rd plaintiff. It was a term of the sale agreement dated 23 March 1994 (the 1st agreement) that the 3rd plaintiff would make all necessary payments which is what she did. It is the 3rd plaintiff's contention that by false representation the defendant persuaded the 1st and 2nd plaintiffs to also sell the said cluster house to the defendant. The prayers sought by the plaintiffs are for various declarations against the defendant.

It is the 3rd plaintiff's case that if she failed in her claim for *inter alia* a declaration that the said cluster house had been rightly sold to her by way of the agreement dated 23 March 1994, she should be refunded, by the defendant, the sums she had advanced on the said cluster house, amounting to RM77,162.47. The said sum was advanced towards renovating the cluster house,

for payment of quit rent, assessment, monthly instalments to the bank and payments to PDC and other expenses which she had detailed in the amendment sought.

Before me Mr. Yeang argued that limitation had set in since most of the items specified in the proposed amended writ show that the monies were expended (except for one item) six years ago. Coupled with this defence Mr. Yeang also argued that the 3rd plaintiff was introducing a new cause of action.

I do not think so. In *Tilcon Ltd v. Land and Real Estate Investments Ltd* [1987] 1 All ER 615 CA, the plaintiffs entered into a 15-year contract with the defendants for the supply of a stipulated annual quota of clay suitable for the manufacture of facing bricks. The plaintiffs rejected the first delivery of clay, asserting that it did not satisfy the contractual requirements as to quality, and they issued a writ seeking a declaration that they were only required to accept clay of a particular quality. The defendants counterclaimed for the amount agreed to be paid under the contract for the first delivery. Subsequently, the defendants applied to amend their counterclaim to plead that the plaintiffs had repudiated the contract by their wrongful refusal to accept the first delivery and that the defendants had accepted the repudiation. The amendment was allowed by the master and the plaintiffs appealed to the judge, contending that the defendants were seeking to add a fresh cause of action, namely repudiation, which arose out of an election to treat the plaintiff's alleged breach as repudiatory but which was made subsequent to the issue of the counterclaim and was therefore barred under the rule preventing the addition of a cause of action which had accrued since the original pleading. The judge dismissed the appeal and the plaintiffs appealed to the Court of Appeal. The Court of Appeal held that the defendants' election to treat the contract as being repudiated was a result of those facts and went to the issue of remedy rather than constituting a fresh fact necessary to complete a new cause of action.

To my mind the situation here is similar. What the 3rd plaintiff is seeking is a remedy. The causes of action have been pleaded in the prayers. The only amendment sought is as to the reimbursement of the monies expended and therefore is not caught by limitation, since the alternative claim for reimbursement is only a remedy arising from the possible failure of the initial cause of action for a declaration.

I had dismissed the appeal and awarded costs in the cause. However since the order has not as yet been extracted and as the defendant has fought this issue tooth and nail at both levels I hold that justice must be served if I set aside my order of awarding costs in the cause. I now award costs both of the appeal and costs before the SAR, to the plaintiffs.